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Attorney for Creditor
CRYSTAL DELLIGATTI

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:	)	Case No.: 11-31854 TEC
	)	R.S. No: SDW-002
	)	Chapter: 13
VISTAPOST, LLC, A DELAWARE)	
LIMITED LIABILITY COMPANY,	)	MOTION FOR RELIEF FROM STAY
Debtor.	)	[11 U.S.C. §§ 362 and 1325, 28 U.S.C. §§
	)	157 and 1334 and Bankruptcy Rule 4001]
CRYSTAL DELLIGATTI,)	
Movant	)	HEARING:
	)	Date: August 31, 2011
v.	)	Time: 1:00 PM
	)	Place: U.S. Bankruptcy Court
	)	235 Pine Street, 23rd Floor
VISTAPOST, LLC, A DELAWARE	)	San Francisco, CA 94104
LIMITED LIABILITY COMPANY,)	
Respondent.	)	<i>The Honorable Thomas E. Carlson</i>

TO: THE HONORABLE THOMAS E. CARLSON, JUDGE OF THE UNITED STATES BANKRUPTCY COURT, THE UNITED STATES TRUSTEE, THE CHAPTER 7 TRUSTEE, ANDREA A. WIRUM, TRUSTEE'S COUNSEL, DEBTOR, DEBTOR'S COUNSEL, AND OTHER INTERESTED PARTIES:

COMES NOW, this 28th day of July, 2011, Movant Crystal Delligatti, hereinafter ("Movant") by and through her counsel of record, Selwyn D. Whitehead, Esq., and hereby files this Motion For Relief From Stay, alleging the following in support thereof:

COUNT I – RELIEF FROM STAY – CAUSE – BAD FAITH

1 1. This court has jurisdiction over the subject matter of this Motion pursuant to
2 provisions of 28 United States Code §§ 157, 1334, and 11 United States Code §§ 362 and 1325.

3 2. The Debtor/Respondent is VistaPost, LLC, a Delaware Limited Liability
4 Company, with an address of 383 Beach Road, CA 94010.

5 3. The Movant is Crystal Delligatti, by and through her counsel of record, Selwyn D.
6 Whitehead, Esq., with an address of 4650 Scotia Avenue Oakland, CA 94605.

7 4. The Debtor filed for protection under Chapter 7 of the United States Bankruptcy
8 Code on May 12, 2011.

9 5. On June 18, 2010, Movant filed her complaint for hostile environment sexual
10 harassment, failure to prevent discrimination and harassment, retaliation and wrongful
11 termination in violation of public policy in the Superior Court of the State of California for the
12 Count of San Mateo, as Case No. CIV 496101. Andrew M. Agtagma, Esq. represents the
13 Movant in her State Court proceeding. The following brief procedural chronology is stated in
14 support of Movant's contentions:

15 a. Sturt-Penrose, both in his capacity as an individual and as an officer
16 and/or officer and/or managing partner of VistaPost, answered the complaint on August 6, 2010,
17 and in the ensuing months, the parties exchanged various written discovery requests.
18 Additionally, Sturt-Penrose both in his capacity as an individual and the officer and/or managing
19 partner of VistaPost, commenced Movant's deposition on October 20, 2010 and completed it on
20 November 19, 2010.

21 b. After the initial case management conference, which was also on October
22 20, 2010, the parties agreed to mediate the case. Mediation was scheduled with Arthur Siegel,
23 Esq. on March 28, 2011. In recommending that only a half-day mediation be scheduled—as
24 opposed to a whole-day mediation—defense counsel, Derrick Sturm Esq., remarked that the
25 mediation “shouldn't take long.”

 c. The import of this comment became clear a week prior to the mediation,
when Sturm informed Movant's Counsel Agtagma that Sturt-Penrose's corporation, VistaPost
intended to file bankruptcy later that week. Sturm stated that Sturt-Penrose was considering
bankruptcy as well. The mediation came and went without the parties settling the case.

 d. Movant noticed the deposition of Sturt-Penrose, both in his capacity as an
individual and as the officer and/or managing partner of VistaPost, to take place on April 11,

1 2011, after it was clear that Sturt-Penrose was not serious about trying to settle the case at
2 mediation. The day before the deposition, when Movant's Counsel Agtagma called to confirm
3 Sturt-Penrose's deposition, defense counsel asked to have the deposition rescheduled. It was
4 rescheduled for April 27, 2011. During the April 27, 2011 deposition, Sturt-Penrose reiterated
5 that VistaPost would be filing bankruptcy "within 48 hours." He reiterated throughout that
6 VistaPost was no longer in operations, but testified that he was now working for a company that
7 he called "Nova Group."

8 e. Sturt-Penrose denied that this latter company is a continuation of the
9 former, but during his deposition, he admitted that the new company is located at the same
10 address, hired three-fourths of VistaPost's staff when it took over, and retained some of the same
11 clientele. A subsequent investigation identified the new company as Novavista Fulfillment,
12 L.L.C. ("Novavista").

13 f. A mandatory settlement conference was held on May 12, 2011 before the
14 Honorable Steven Dylina of San Mateo Superior Court. At the conference, Movant's Counsel
15 Agtagma informed Defense Counsel Sturm that Movant would seek leave to amend the
16 complaint to add Novavista as a defendant. Sturm responded that the new company would be
17 winding down as well, even though it had only begun operations a few months earlier. Sturt-
18 Penrose also reiterated that a bankruptcy petition was being filed that day. Judge Dylina asked
19 Sturt-Penrose to fax proof of the bankruptcy filing to the Court and had the parties wait until it
20 was received. Judge Dylina let the parties go after one hour, despite not having received the
21 requested fax.

22 g. The following day, Movant's Counsel Agtagma received a notice of stay
23 as the result of VistaPost's Chapter 7 bankruptcy filing. The trial, which was scheduled on May
24 31, 2011, was vacated accordingly. (Co-Defendant Sturt-Penrose then filed his Chapter 13
25 petition a few weeks later on May 27, 2011.)

6. These acts support Movant's contention that Debtor filed bankruptcy for the sole
purpose of eliminating the debtor's obligation to pay Movant for the pending Hostile
Environment, Sexual Harassment, Failure To Prevent Discrimination And Harassment,
Retaliation And Wrongful Termination In Violation Of Public Policy Litigation; a clear showing
of bad faith.

7. Debtor caused willful and malicious injury to another entity or to the property of

1 another entity, namely the Movant. Willful and malicious injury is evident to the Movant by not
2 only the filing of Debtor's business bankruptcy but also the personal bankruptcy filing of the
3 Co-Defendant Debtor, Edward P. Sturt-Penrose and Co-Debtor Heather L. Gibbons, which was
4 filed on May 27, 2011, Northern District Case Number 11-32059, and the fact that the new
5 company, Novavista would be winding down as well, even though it had only begun operations a
6 few months earlier.

7 8. The dissolution of VistaPost and the filing of the personal chapter 13 of Co-
8 Defendant Debtor Strut-Penrose shields VistaPost and the personal Debtors from the lawsuit,
9 thereby eliminating any of the Debtors in either of the bankruptcies from their obligation to settle
10 with Movant for the pending Hostile Environment, Sexual Harassment, Failure To Prevent
11 Discrimination And Harassment, Retaliation And Wrongful Termination In Violation Of Public
12 Policy Litigation.

13 9. The filing of a bankruptcy petition automatically stays "the ... continuation... of
14 a judicial.. or other action or proceeding against the debtor that was.... commenced before the
15 commencement of the case under this title..." 11 U.S.C. §362(a)(1). But the bankruptcy court
16 can grant relief from the stay for "cause." 11 U.S.C. §362(d)(1). Whether sufficient cause
17 exists is within the court's discretion based on the facts of each case. *In re Delaney-Morin*,
18 304 B.R. 365, 369 (9th Cir. BAP 2003). "'Cause' is an intentionally broad and flexible
19 concept..." *In re Brown*, 311 B.R. 409, 412-13 (E.D. Pa. 2004).

20 Factors to consider in determining whether the automatic stay should be
21 modified for cause include: (1) an interference with the bankruptcy; (2) good or
22 bad faith of the debtor, (3) injury to the debtor and other creditors if the stay is
23 modified; (4) injury to the movant if the stay is not modified; and (5) the relative
24 proportionality of the harms from modifying or continuing the stay.

25 *In re A Partners LLC*, 344 B.R. 114, 127 (B.R. ED CA 2006) (emphasis added).

Bad faith can be sufficient to justify relief from the automatic stay for cause, although
other factors might, in a specific case, mitigate against lifting the stay. But "bad faith" means "an
abuse of the bankruptcy process [that] is offensive to the integrity of the bankruptcy system." *In*
re Yukon Enterprises Inc., 39 B.R. 919, 922 (B.R. CD Cal 1984). Attempts to use the bankruptcy
system to thwart creditors would qualify as bad faith.

10. Here, granting Movant's lift stay motion will not interfere with Debtor's chapter 7

1 case. To the contrary, Debtor has listed Movant's pending state court action on its Schedule F as
2 a contingent, unliquidated, disputed claim. As such, allowing this matter to be fully litigated in
3 state court will result in either a liquidated nondischargeable debt if the Movant prevails or no
4 debt at all if the Debtor prevails. In either case, there will be no additional burdens to either the
5 Debtor or its other creditors in the pending chapter 7, while there will be irreparable harm to
6 Movant if the stay is not lifted. Finally, as has been stated above, Debtor has shown it's bad faith
7 by filing the bankruptcy to defeat Movant's pending state court litigation.

8 11. By reason of the foregoing, Movant is entitled to relief from stay under 11 United
9 States Code § 362(d)(1) for cause. If Movant is not permitted to continue the above-mentioned
10 pending state court litigation, Movant will suffer further irreparable injury, loss and damage.
11 Granting said Motion for Relief for continuance of the state court litigation will curtail additional
12 suffering, further irreparable injury, loss and damage.

13 **COUNT II – RELIEF FROM STAY – CAUSE – CONGRESSIONAL POLICY**
14 **FAVORING PLAINTIFF'S CHOICE OF FORUM**

15 12. 11 U.S.C. Sec. 362(d)(1) allows relief from the automatic stays provided by §
16 362(a) for "cause." "Because there is no clear definition of what constitutes 'cause', discretionary
17 relief from the stay must be determined on a case by case basis." In this case, several factors
18 constitute "cause." Most notably, the clear congressional policy to give state law claimants a
19 right to have claims heard in state court. See 28 U.S.C. §1334(c). See *In re Castlerock Props.*,
20 781 F.2d 159 (9th Cir. 1986). And that right to have matters decided in state court becomes
21 mandatory were the action in question concerns a personal injury tort. See 28 U.S.C.
22 §157(b)(2)(O). An analogy to the bankruptcy court's abstention and remand analysis process is
23 appropriate here.

24 13. Bankruptcy Courts *may*, and sometimes *must* abstain from hearing disputes that
25 are only tangentially related to the bankruptcy case. (See 28 U.S.C. §1334(c); *In re Tucson*
Estates, Inc. 9th Cir 1990 912 F.2d 1162, 1169.).

26 **A. Discretionary Abstention Under 28 U.S.C. §1334(c)(1)**

27 14. Discretionary abstention under § 1334 applies to both core and noncore
28 proceedings. (See 28 U.S.C. §1334(c)(1) – court may abstain from hearing proceedings “arising
29 under title 11 or arising in or related to a case under title 11”).

1 A bankruptcy court may not abstain from hearing a particular action unless the action is
2 currently pending in state court. The grounds for discretionary abstention are found where: (1)
3 the effect (or lack thereof) on efficient administration of the estate if a court recommends
4 abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the
5 difficulty or unsettled nature of applicable law; (4) the presence of a related proceeding
6 commence in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other
7 than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main
8 bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the
9 feasibility of severing state law claims from core bankruptcy matters to allow judgment to be
10 entered in state court with enforcement left to the bankruptcy court; (9) the burden of the
11 bankruptcy court's docket; (10) the likelihood that commencement of the proceeding in
12 bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to
13 jury trial; and (12) the presence in the proceeding of nondebtor parties. (*In re Tucson Estates,*
14 *Inc.* 912 F.2d 1162, 1167 (9th Cir. 1990); *In re Eastport Assocs.* 935 F.2d 1071, 1075-1076 (9th
15 Cir. 1991); *In r Lazar* 200 B.R. 358, 372 (CD CA 1996)).

16 At bottom, the question is committed to the sound discretion of the bankruptcy judge.
17 *McCarthy v. Prince*(*In re McCarthy*), 230 B.R. 414, (9th Cir. BAP 1999). According to the
18 Honorable Leslie Tchaikovsky (Retired), among other authorities, "cases decided under the
19 abstention statute are persuasive authority for determining whether a removed action should be
20 remanded [or allowed to proceed in state court by lifting the stay]." *Lorence v. Pepler* (*In re*
21 *Diversified Contract Services*), 167 B.R. 591, 596 (ND CA 1994). The factors that must be
22 considered for remand or abstention in this instance are the same. They are:

23 a. the court's duty to decide matters properly before it;
24 b. the plaintiff's choice of forum as between state and federal courts;
25 c. the nature of the claim or claims, that is, whether purely state law
matters which could be better addressed by the state court are involved;
d. prejudice to involuntarily removed parties;
e. comity considerations;
f. economical and/or duplicative use of judicial resources; and,
g. effect a remand decision would have on the efficient and economic
administration of the estate. *Gorse v. Long Neck Ltd., (Matter of Long Neck, Ltd.)*, 107 B.R. 479

1 (D DE 1988); see also *In re Marathon Home Loans* 96 B.R. 296, 300 (ED CA 1989) (recognized
2 equitable ground include fairness, judicial economy, forum non conveniens, prompt and final
3 resolution of disputes, and respect for state courts on question of state law).

4 15. Here, Movant's has selected the state court as her forum of choice. The
5 proceeding is in question involves matters that are purely state law questions – Hostile
6 Environment, Sexual Harassment, Failure To Prevent Discrimination And Harassment,
7 Retaliation And Wrongful Termination In Violation Of Public Policy Litigation. Movant is
8 prejudiced by having her state court matter, which is ready for trial, stayed in bankruptcy court.
9 Comity favors allowing this state court litigation to proceed in state court and extracting this
10 matter from Debtor's bankruptcy will have little if any effect on the administration of the
11 bankruptcy estate. In sum, fairness, judicial economy, forum non conveniens, the ability for
12 prompt and final resolution of the parties' disputes, as well as the respect for state courts on
13 question of state law weigh in favor of lifting the stay on discretionary abstention grounds.

14 **B. Mandatory Abstention Under 28 U.S.C. §1334(c)(2)**

15 16. Mandatory abstention is required where the proceeding in question is “based upon
16 a State law claim or State law cause of action, related to a case under title 11 but not arising
17 under title 11 or arising in a case under title 11, with respect to which an action could not have
18 been commenced in a court of the United States absent jurisdiction under this section ... if an
19 action is commenced, and can be timely adjudicated, in a State forum of appropriate
20 jurisdiction.” (See U.S.C. § 1334(c)(2)). Mandatory abstention under 1334 applies to
21 proceedings commenced in state court where the court finds that: (1) the abstention motion is
22 timely made; (2) the proceedings involves a purely state law question; (3) the proceeding is
23 noncore and merely “related to” the bankruptcy case; (4) no independent federal jurisdiction
24 exists for the proceeding absent filing of the bankruptcy petition; (5) an action was commenced
25 in state court; (6) the proceeding can be timely adjudicated in state court; and, (7) jurisdiction is
appropriate in state court. (*In re Lazar* CD CA 1996) 200 B.R. 358, 370; *In re Conejo*
Enterprises, Inc., 71 F.3d 1460, 1464 (9th Cir. 1995); *In re Kold Kist Brands, Inc.* (CD CA
1993) 158 B.R. 175, 178); *In re World Solar Corporation.*, 81 B.R. 603, 606 (SD CA 1988); *In*
re Baldwin Park Inn Assoc., 144 B.R. 475 (CD CA 1992).

17. Here, Movant's motion is timely in that it is filed within two and one-half months
of the bankruptcy case filing on May 12, 2011 and nine days after the continued date of the

1 meeting of the creditors on July 19, 2011. The proceeding Movant desires to recommence in
2 state court involve purely state law questions – Hostile Environment, Sexual Harassment, Failure
3 To Prevent Discrimination And Harassment, Retaliation And Wrongful Termination In Violation
4 Of Public Policy Litigation. As such and as “personal injury torts” excepted from inclusion as a
5 core matter in 28 U.S.C. § 157 (b)(2)(O), the litigation in question is noncore and merely “related
6 to” the bankruptcy case and therefore, has no independent federal jurisdiction absent the
7 Debtor’s filing their bankruptcy petition. As stated above, the proceeding Movant desires to
8 recommence was commenced in the Superior Court of the State of California for the County of
9 San Mateo on June 18, 2010. Superior Court has the expertise to timely adjudicate the subject
10 matter and is therefore the most appropriate jurisdiction to hear the matter.

11 18. Finally, as personal injury tort and wrongful death claims are excluded from
12 Bankruptcy Court jurisdiction, Movant’s Hostile Environment, Sexual Harassment, Failure To
13 Prevent Discrimination And Harassment, Retaliation And Wrongful Termination In Violation Of
14 Public Policy claims must either be tried in district court or state court. See 11 U.S.C. §
15 157(b)(5). This special status is the result of Congress’ awareness that personal injury tort and
16 wrongful death victims do not voluntarily enter into dealings with debtors and accept the risk of
17 loss in the same sense as traditional bankruptcy claimants. See *In re Poole Funeral Chapel, Inc.*,
18 63 B.R. 527, 530 (ND AL 1986). Sexual harassment claims are personal injury claims within the
19 meaning of § 157(b); *Stranz v. Ice Cream Liquidation, Inc. (In re Ice Cream Liquidation, Inc.)*,
20 281 B.R. 145 (D CT). Therefore, this Court is subject to the mandatory abstention provisions of
21 28 U.S.C. § 1334(c)(2). Movant wishes to refer this Court to the recent Supreme Court decision
22 of *Stern v. Marshall*, 564 U. S. ____ (2011), which reiterates The Court’s prior holdings that
23 Bankruptcy Courts are courts of limited jurisdiction. Unlike respondent Marshall, in *Stern*,
24 Movant here neither consents to the Bankruptcy Court’s jurisdiction of her pending personal
25 injury tort, nor is she “‘sandbagging’ the court—remaining silent about [her] objection...” to this
Court’s jurisdiction. Instead, she is coming straight out, at her earliest reasonable opportunity, to
inform this Court of Movant’s wish to have her day in court in the forum of her choice: Superior
Court of the State of California for the Count of San Mateo.

19. Thus, Movant has provided the rationale, both for discretionary and mandatory
abstention and that either basis standing alone, constituting “cause” for lifting the stay to allow
the state court action to proceed to judgment in a nonbankruptcy forum. (See *In Re Universal*

1 *Life Church, Inc.* 127 B.R. 453, 455 (ED CA 1991).

2 **CONCLUSION**

3 20. By reason of the foregoing, Movant is entitled to relief from stay under 11
4 United States Code § 362(d)(1) for cause. Further, if Movant is not permitted to continue
5 the above-mentioned pending litigation, Movant will suffer further irreparable injury, loss
6 and damage. Granting said Motion for Relief for continuance will circumvent additional
7 suffering, further irreparable injury, loss and damage.

8 WHEREFORE, Movant, Crystal Deligatti, moves that the stay pursuant to 11 U.S.C. §
9 362 be lifted to permit the pending Hostile Environment, Sexual Harassment, Failure To Prevent
10 Discrimination And Harassment, Retaliation And Wrongful Termination In Violation Of Public
11 Policy Litigation to continue and allow her to pursue any other remedies that she might have
12 under state law with respect to recovering a claim against the Debtor that arose before the
13 commencement of the instant bankruptcy case.

14 Dated: July 28, 2011

Respectfully Submitted,

15 LAW OFFICES OF SELWYN D. WHITEHEAD

16 /s/ Selwyn D. Whitehead, Esq.
17 SELWYN D. WHITEHAD, ESQ.
Attorney for Creditor
CRYSTAL DELLIGANTTI

CERTIFICATE OF SERVICE

I, Selwyn D. Whitehead the undersigned, declare :

I am employed in the City of Oakland, County of Alameda, California. I am over the age of 18 years and not a party to this action. My business address is 4650 Scotia Avenue Oakland, CA 94605. On July 28, 2011, I served the following document(s):

**(1) RELIEF FROM STAY COVERSHEET
(2) MOTION FOR RELIEF FROM STAY
(3) NOTICE OF HEARING ON MOTION FOR RELIEF FROM STAY; and,
(4) DECLARATION OF ANDREW M. AGTAGMA IN SUPPORT OF MOTION FOR RELIEF FROM STAY**

on each party listed below in the manner or manners described below and addressed as follows:

Service Via U.S. Mail:

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Chambers Copy

The Honorable Thomas E. Carlson
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I am readily familiar with the business practices of the Law Offices of Selwyn D. Whitehead, for the collection and processing of correspondence for mailing with the United States Postal Service and that correspondence is deposited with the United States Postal Service that same day in the ordinary course of business by placing a true copy thereof enclosed in a sealed envelop via postage pre-paid, regular first class mail and/or electronic service via the Court's ECF System.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of July, 2011 at Oakland, California.

/s/ Selwyn D. Whitehead, Esq.
SELWYN D. WHITEHAD, ESQ.